Cooley

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Unless an agreement on the federal budget is reached, and it's looking increasingly unlikely, there will be a federal government "shutdown" at midnight on Friday. According to the Washington Post, about 800,000 federal employees could be furloughed across the country. The exceptions are those employees (1) performing emergency work involving the safety of human life or the protection of property, (2) performing minimal activities as necessary to execute an orderly suspension of agency operations related to non-excepted activities, or (3) performing certain other types of excepted work. Apparently, under a 19th-century law known as the Anti-Deficiency Act, it is illegal for "nonessential" federal employees even to work voluntarily during a shutdown. Federal employees are being told that, as soon as funding lapses, federal departments and agencies will not be permitted to incur further financial obligations performing activities funded by annual appropriations, except those related to the orderly suspension of operations or performance of excepted activities. For example, government websites not tied to "essential" government services would not be updated during a shutdown. Federal agencies have prepared or are completing contingency planning now to determine which activities are "excepted."

In an Update released this afternoon, the SEC indicated that the crew at the SEC would be skeletal, with staff members focused on essential activities such as urgent matters involving safety of persons and protection of property.

The EDGAR system will be functional, and, as a result, voluntary filings and public comment letters may still be submitted, and required reports, forms and schedules will still need to be filed. We have been advised by the SEC's Office of EDGAR Filer Support that filings such as periodic reports and registration statements will be posted online, but filings, such as Form Ds, that require visual review before posting, will likely not be posted online. There will be no EDGAR filer support staff, although it is expected that there will be a supervisor at the EDGAR support number (202-551-8900), at least on Monday. Presumably, it will be extremely difficult to get through on that line. There will be no staff to review and comment on filings, answer substantive questions, issue no-action letters or perform other functions typical for the staff of the Division of Corporation Finance. It appears unlikely at this point that anyone would be available to handle activities such as processing fee payments, providing EDGAR codes or providing oral confirmation of effectiveness or the absence of stop orders.

Accordingly, if you expect that you may have need for any of those functions in the near future—or any other function or activity at the SEC that requires human intervention—we recommend that you consider addressing those matters today or tomorrow to the extent possible, just in case the shutdown goes forward. For example, if you are planning to file an S-8 (which becomes effective automatically), you may want to submit funds into your SEC account now to cover the anticipated registration fees. (The SEC permits companies to pay fees in advance and to maintain balances in their accounts at the U.S. Treasury-designated depository; funds are returned if accounts are inactive for 180 days.) Similarly, if you have a new director who will need to file a Form 3 and requires an EDGAR code, it may be wise to address that today or tomorrow. For emergency situations related to the Division of Corporation Finance, the staff may be contacted at CFemergency@sec.gov or 202/551-3100. We will keep you apprised of any significant new developments.

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